DENIED APR 21 1924

No. [redacted]

SUPREME COURT OF THE UNITED STATES

EASTMAN KODAK COMPANY OF NEW YORK,
Petitioner,

vs.

SOUTHERN PHOTO MATERIAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

[redacted]
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1923.

EASTMAN KODAK COMPANY OF NEW YORK, Petitioner, AGAINST SOUTHERN PHOTO MATERIAL COMPANY, Respondent.	No. 781.

DEAR SIRS:

PLEASE TAKE NOTICE that upon the annexed petition and brief of and on behalf of the Eastman Kodak Company of New York, and a certified copy of the transcript of the record in this cause, including the proceedings in the United States Circuit Court of Appeals for the Fifth Circuit, submitted herewith, an application will be made to the Supreme Court of the United States, at a term of said court appointed to be held at the Capitol, Washington, D. C., on Monday, the 14th day of April, 1924, at the opening of the court on that day or as soon thereafter as counsel can be heard, for a writ of certiorari to be directed to the said United States Circuit Court of Appeals for the Fifth Circuit, to review the judgment of said Court made and entered in the above cause on or about the 19th day of December,

Supreme Court of the United States

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1923, to the end that the said judgment may be set aside, reversed and annulled, and that such further proceedings in said cause may be had as to justice shall appertain.

Dated, Atlanta, Georgia, March 8th, 1924.

JOHN W. DAVIS,
ALEXANDER W. SMITH,
FRANK L. CRAWFORD,
CLARENCE P. MOSER,
Attorneys and of Counsel
for the Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1923.

EASTMAN KODAK COMPANY OF NEW YORK, Petitioner, AGAINST SOUTHERN PHOTO MATERIAL COMPANY, Respondent.	No. 781.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Eastman Kodak Company of New York, a New York corporation, respectfully shows to the Court as follows:

I.

1. On or about the 19th day of December, 1923, a final judgment was made and entered by the United States Circuit Court of Appeals for the Fifth Circuit, affirming a final judgment for $28,743.98 in favor of the respondent and against the petitioner, which latter final judgment was made and entered in the District Court of the United States for the Northern Division of the Northern District of Georgia on or about the 30th day of Septem-

ber, 1922, in an action at law wherein petitioner was defendant and the respondent was plaintiff.

2. *A writ of error directed to said United States Circuit Court of Appeals for the Fifth Circuit to review said final judgment has been allowed by Mr. Justice Sanford upon a petition filed by this petitioner.* A supersedeas bond given by petitioner has been approved, and the writ of error and a citation thereon have been issued, served and returned to this Court in accordance with law. Petitioner was advised that the cause was probably not one in which the decision of the Circuit Court of Appeals would have been final save for the power of this Court to grant a certiorari, but on further consideration of the facts in the cause and of the statute in such case made and provided, petitioner conceives that there may be a doubt upon this point and as to whether a writ of error was the proper remedy for petitioner in the premises, and, therefore, for greater certainty petitioner prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to bring up its said final judgment for review in this Court, because of the importance of the questions involved and on the special ground of the necessity of avoiding conflict between two or more United States Circuit Courts of Appeals, inasmuch as an important and outstanding question in the cause has been decided in one way in the United States Circuit Courts of Appeals for the Second and Third Circuits respectively, and by the said United States Circuit Court of Appeals for the Fifth Circuit in exactly the opposite way.

ESSENTIAL FACTS.

II.

3. Petitioner is a New York corporation engaged in the manufacture of photographic goods and having its principal place of business in the City of Rochester, State of New York. Respondent is a Georgia corporation having its principal place of business in the City of Atlanta, State of Georgia, and has been engaged since 1901 in different locations in Atlanta in the business of selling photographic goods to professional photographers and amateurs (Rec., 149).

In February, 1915, respondent brought this action against the petitioner to recover damages claimed to have been sustained by respondent through breaches of the Act of Congress passed July 2, 1890, commonly known as the Sherman Act (Rec., 4) alleged to have been committed by petitioner. The case was tried before Honorable Samuel H. Sibley, United States District Judge, and a jury, during the month of September, 1922, at Atlanta aforesaid, in the Northern Division of the Northern District of Georgia, and a verdict was returned in favor of the respondent in the sum of $7,914.66, which being trebled, and an allowance of $5,000 attorneys' fees having been made by the Court, the above named judgment resulted (Rec., pp. 61-2).

4. Down to the month of November, 1911, as to photographic goods manufactured by it under secret processes (Rec., 360, 640), and down to the month of June, 1913, as to photographic goods covered by its Letters Patent (Rec., 361, 644), petitioner carried on its business under a system whereby such goods were sold by it under restrictive contracts designated as "Terms of Sale," according to which such goods could be resold by the petitioner's customer only at prices fixed by the

petitioner, while the customer also agreed not to handle goods which competed with the restricted goods sold to him by the petitioner. Prior to the commencement of this action, a suit had been brought by the United States against petitioner and others for alleged violations of the Anti-Trust Acts of the United States, which suit terminated in a decree adjudging that petitioner had been guilty of monopoly (Rec., 542-545). In the trial of the present cause it was alleged and maintained by the respondent that petitioner's said system of restrictive contracts or Terms of Sale was unlawful, especially in view of said decree, which was pleaded by the respondent and admitted in evidence. In 1901 respondent became a regular customer of the petitioner and fully accepted its said restrictive system as the same developed (Rec., 204-5); repeatedly approved of such system (Rec., 204-5; 228); contracted to maintain the same (Rec., 211); realized large profits through a long period by its acquiescence in and conformity to petitioner's said system; when called to account for sundry violations of the Terms of Sale, apologized profusely, promised future compliance and re-affirmed its intention to comply with the Terms of Sale in all respects (Rec., 230); and on numerous occasions reported violations of such Terms of Sale by other dealers (Rec., 215-18; 223-4). Respondent finally ceased to be a customer of petitioner in April 1910, up to which time it had continuously conformed to such Terms of Sale ever since 1901 (Rec., 165-9). Thereafter petitioner did not sell any goods of its manufacture to the respondent.

5. Upon the trial respondent, claiming to recover for damages alleged to have been sustained by it in its business, by being prevented from purchasing peti-

tioner's goods at dealers' prices, such damages to cover the period from April, 1910 to the beginning of the action, was permitted to offer proof of profits alleged to have been made by respondent from the sales of petitioner's goods prior to April, 1910, and to use such proof as a standard for measuring profits which respondent claimed to have lost after April, 1910, upon sales which it would have made of petitioner's goods had it not been prevented from handling the same. Petitioner, in its answer and on the trial, and also in its argument on its appeal below, averred and maintained that, if petitioner's system of doing business under such Terms of Sale was unlawful, then the respondent throughout the period during which it was petitioner's customer was *in pari delicto* with the petitioner, and that, hence, the amount of the profits earned by respondent during the earlier period could not be used as a standard by which to measure damages alleged to have been sustained by respondent in the period for which it was allowed to recover; that, inasmuch as the whole of the respondent's claim for damages rested upon such proof of earlier profits, there was no competent proof of damages in the record.

The Circuit Court of Appeals for the Fifth Circuit, in its decision affirming the judgment of the court below, held that the point just stated was not well taken, and that the respondent was not *in pari delicto* with the petitioner, saying (Rec.,):

> "There was evidence from which the jury could justly reach the conclusion that the plaintiff was not a party to the alleged monopoly, and, therefore, was not *in pari delicto* with the defendant. The jury could well have believed that the plaintiff complied with defendant's restricted terms of re-sale for the reason that otherwise the plaintiff could not purchase or secure the goods necessary

> in the conduct of its business. The plaintiff was a small concern and its approval or disapproval of defendant's method of doing business was a matter of no moment."

The United States Circuit Court of Appeals for the Third Circuit held to the contrary on the precise question in *Victor Talking Machine Company* v. *Kemeny*, 271 Fed. 810, where Woolley, *C. J.*, *said* at page 819:

> "* * * We are constrained to hold that the learned Trial Judge fell into error when he permitted the jury to find damages by way of unrealized profits from evidence of profits which the plaintiff had made when engaged with the defendant in an unlawful business. Profits which the plaintiff could anticipate if he had been permitted to go on and sell Victor products were only such as he could earn lawfully in a competitive market. Such profits cannot, we think, be ascertained from profits which he had earned under a system whose sole purpose was to maintain prices, restrict competition and create monopoly."

The facts in the case last cited were closely analogous to those in the instant case and the questions involved were identical.

The United States Circuit Court of Appeals for the Second Circuit has also decided the same question in accordance with the position here taken by petitioner, in the case of *Eastman Kodak Company* v. *Blackmore*, 277 Fed. 694, at page 699 where Mayer, *C. J.*, said:

> "If plaintiff and defendant were engaged in an illegal restrictive system, from 1899 to 1902, obviously that period cannot be set up as a standard with which to compare the profits of the period after 1908. It is necessary upon this point to refer merely to what was said in *Victor Talking Machine Co.* v. *Kemeny*, *supra*, at pages 818 and 819."

In this last cited case, the plaintiff-in-error was the present petitioner and the alleged illegal system referred to was the very same as that which is the subject of the instant case. Defendant-in-error, Blackmore, in the case just cited, had, like the respondent in the instant case, operated for a long period under the identical Terms of Sale which are here under consideration, in all practical respects as did the respondent in the instant case.

III.

At no time prior to the commencement of this action did the petitioner have in the State of Georgia any office or place of business or plant for the manufacture of products, or any warehouse for the storage or display of its goods, or property of any kind connected with its business, or branch house or agent residing in that State nor did it transact business in that State (Rec., 677; 697-8; 724; 734; 746). It has never registered as a non-resident corporation for the purpose of doing business in the State of Georgia (Rec., 734-5). When this action was begun, it had no employees in the State of Georgia except travelling salesmen, who from time to time visited dealers in that State as well as those in other States, and took orders from them, which orders were transmitted to the home office of the petitioner at Rochester in the State of New York or to its branch office in New York City (Rec., 683-697, 704-5); and except what are called "demonstrators," whose duties are described below. None of petitioner's travelling salesmen maintained a fixed office or place of business within the State of Georgia (Rec., 704-5); but visited that State and other states about four times a year (Rec., 704, 718). All orders taken by salesmen were passed upon as to their credit and were

accepted or rejected solely at the petitioner's office at Rochester in the State of New York or at its branch office in New York City (Rec., 719-20; 735-6). The duties of a demonstrator consist in calling on consumers and showing them how to use the goods and endeavoring to show them the superiority of Eastman goods (Rec., 682). These demonstrators maintained no office or place of business within the State of Georgia, had no connection with sales and did not take orders for the petitioner nor solicit orders of any sort, but in some cases, as an accommodation to a photographer, would take orders from a photographer to be sent, and which they did send, to dealers to be filled (Rec., 684-5; 705-6). Service of process in the action was attempted to be made upon the petitioner by delivering copies thereof to the Treasurer of petitioner at Rochester in the State of New York aforesaid (Rec., 660), whereupon, the petitioner, claiming that it was not a resident of and was not doing business in the State of Georgia and that it was not found in said State and had no agent there, appeared specially, traversed the return of the Marshal, moved to quash said return and the said attempted service and filed a plea to the jurisdiction (Rec., 661). After the taking of proofs, the District Court overruled petitioner's plea and the traverse of the service and motion to quash (Rec., 779, 666) with leave to the petitioner to plead to the merits (Rec., 667), which petitioner thereafter did. On the argument in the Circuit Court of Appeals, petitioner renewed its motion to quash and to dismiss the case on the grounds that the Trial Court had acquired, as aforesaid, no jurisdiction of the petitioner.

IV.

QUESTIONS PRESENTED.

6. The following questions of law, with others, are raised in the case:

(a) Whether, assuming that petitioner's system of doing business through its restrictive Terms of Sale, as heretofore described, was unlawful, the respondent, having conformed to and obtained the advantages of said system down to April, 1910, and having been up to that date an active and voluntary participant in the unlawful acts of the petitioner, if such they were, was not during said period *in pari delicto* with the petitioner, and if so, whether the respondent should have been allowed to prove profits made by it during the period when it was so *in pari delicto,* as a standard by which to measure damages alleged to have been sustained by the respondent after it had ceased to be petitioner's customer.

(b) Whether at the time of the commencement of the action petitioner resided or was found in the State of Georgia or was transacting business in said State, and whether the attempted service of process upon petitioner was not void, and whether the Court has or had any jurisdiction of the alleged cause of action, in view of the premises.

V.

Your petitioner presents herewith, as part of this petition, a transcript of the record in said cause in the United States Circuit Court of Appeals for the Fifth Circuit and refers to the Assignment of Errors filed by petitioner on its application for said writ of error and makes the same a part of this petition.

Your petitioner, therefore, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the said United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record in said cause and of all proceedings of said Circuit Court of Appeals, which were entitled in that cause, or directing that the transcript of the record and proceedings returned in obedience to the writ of error stand as the return to the writ of certiorari; to the end that said cause may be reviewed and determined by this Court as provided by law; and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the said final judgment of the said Circuit Court of Appeals be reversed and set aside, and that such other proceedings in the cause shall be had as to justice shall appertain.

And your petitioner will ever pray, etc.

Dated, March 8, 1924.

EASTMAN KODAK COMPANY OF NEW YORK,

By Geo. Eastman

JOHN W. DAVIS,
ALEXANDER W. SMITH,
FRANK L. CRAWFORD,
CLARENCE P. MOSER,
Of Counsel for Petitioner.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

FRANK L. CRAWFORD, being duly sworn, says: That he is one of counsel for the EASTMAN KODAK COMPANY OF NEW YORK, the petitioner herein; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

FRANK L. CRAWFORD.

Sworn to and subscribed before me this 12th day of March, 1924.

FRANCES I. SIMS,
Notary Public,
New York County No. 278.
Register's No. 4062.
Commission expires March 30, 1924. (L. S.)